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July 27, 1998

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FEDERAL COMMUNICATIONS COMMISSION
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Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
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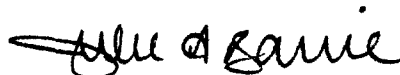
Re: CC Docket No. 98-92

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Telecommunications Corporation (TDS TELECOM), are an original and 12 copies of its reply comments on the Hyperion Petition for Preemption of Tennessee Regulatory Authority Order, CC Docket No. 98-92.

In the event of any questions concerning this matter, please communicate with this office.

Very Truly Yours,



Julie A. Barrie

Enclosure

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)

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HYPERION PETITION FOR
PREEMPTION OF TENNESSEE
REGULATORY AUTHORITY
ORDER)

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CC DOCKET NO. 98-92

REPLY COMMENTS OF TDS TELECOM

TDS TELECOM, with and on behalf of its four wholly-owned subsidiaries in Tennessee, Tennessee Telephone Company (Tennessee Telephone), Concord Telephone Exchange, Inc., Humphreys County Telephone Company and Tellico Telephone Company (TDS TELECOM or TDS), and by its attorneys, files these reply comments in response to comments supporting the Petition for Preemption filed by Hyperion of Tennessee, L.P. (Hyperion). The supporting comments filed by ALTS, KMC, MCI and Worldcom add nothing new to the debate about preempting the Tennessee Regulatory Authority's (TRA) denial of Hyperion's request for expanded authority and TCA 65-4-201(d). The record establishes that the Commission should not preempt the TRA's well-justified action, let alone dictate how the TRA should deal with Hyperion's expansion request or prejudge all future interpretations and applications of the Tennessee law designed to protect Tennessee consumers and universal service during the difficult transition to competition and compatible universal service mechanisms.

The TRA's Denial Order and comments and TDS TELECOM's comments have explained that the TRA's application of TCA §65-4-201(d) in denying Hyperion's application is "necessary to preserve universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," and thus within the §253(b) exception from preemption. KMC Telecom, Inc. contends (p. 4) that the TRA's concern with universal service is a "red herring" because this Commission has already adopted universal service rules and states are looking into universal service programs. To the contrary, recent Commission actions confirm that development of the "sufficient" federal universal service mechanism and lawful partitioning of state and federal universal service responsibilities required by §254 is even less imminent and predictable than TDS TELECOM explained in its opening comments, especially for statutorily-defined "rural telephone companies" such as Tennessee Telephone.¹ Noting (§2) its commitment to Congress to complete reconsideration proceedings about "the federal share of support" before implementing revised non-rural support mechanisms, the Commission referred sweeping, fundamental questions to the Joint Board created under §254 to recommend universal service modifications to the Commission. The open issues include (§§5-6) reexamining the states' legal responsibility for federal universal service cost recovery and reforming implicit state support. The Commission allowed the Joint Board until November 23, 1998 to submit recommendations, delayed by six months its scheduled implementation of universal service reforms for non-rural ILECs and

¹ Order and Order on Reconsideration, CC Docket No. 96-45, FCC 98-160 (rel. July 17, 1998).

decided (§10) not even to schedule commencement of the necessary further rural ILEC universal service reform proceeding until “a later date,” after additional Joint Board and Rural Task Force proceedings “have been conducted.” In short, at this point in the transition to competition and new support programs, Tennessee and the TRA cannot even speculate about the level or nature of the state’s burden for maintaining affordable rates, advancing the infrastructure and providing up-to-date services in rural areas. The TRA cannot even tell whether the Commission will claim authority to force Tennessee to replace its existing, effective implicit support mechanisms. The permanent federal support framework for rural ILECs cannot be completed until the non-rural proxy model is completed and separately validated for rural ILEC areas. Thus, the TRA’s decision that premature competition must not undermine its universal service arrangements during this critical transition period is fully justified. It would be unconscionable and harmful to Tennessee consumers to preempt — as a “red herring” — the TRA’s action to preserve existing intrastate universal service support while permanent universal mechanisms are under consideration (p. 5) and the State cannot even tell whether it must also pick up 75% of the federal support burden.

Predictably, the supporting comments also all attack the TRA’s action and the Tennessee law as not “competitively neutral.” The TRA maintains that it applies the same test to all applicants. It has, in fact, simply required all rural providers — including the incumbent that is under continuing universal service and averaged pricing obligations throughout its service area — not to threaten its implicit universal service structure until a new one is in place. Not one of the supporting comments explains how it would be competitively neutral to require the TRA to

authorize Hyperion to compete for the business, institutional and government customers in Tennessee Telephone's area at deaveraged rates under its own control, with freedom to price service to those high volume, low cost customers as low as possible. None of the supporters discuss why the TRA should not protect Tennessee Telephone's customers in the most high cost and rural portions of its service area from higher rates and slowed network advances owing to the support lost to Hyperion's targeted competition.

Indeed, under the standard MCI quotes from TCI² — whether application of a state law “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment,” — the TRA's application of TCA §65-4-201(d) is again justified: It is the only effective and currently available means for the TRA to ward off the adverse consumer consequences of premature competition while the “legal and regulatory environment” remains anything but “fair and balanced” and universal service for Tennessee Telephone's most rural customers remains at risk.


Consequently, the Commission should not (a) disturb the TRA's valid transitional application of the Tennessee statute, (b) presume to dictate how the State must deal with Hyperion's expansion request (even if it preempts the Denial Order), or (c) preempt TCA 65-4-

² TCI Cablevision of Oakland County, Inc., FCC 97-331, ¶97 (emphasis added) (denying advance preemption of a state statute under §253).

201(d) and deprive the State of the right, preserved by Congress in §253(b) and (f), to prevent competition in rural telephone company areas from imperiling universal service and other important consumer interests.

Respectfully submitted,

TDS TELECOM

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July 27, 1998

CERTIFICATE OF SERVICE

I, Victoria C. Kim, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing TDS TELECOM's Reply Comments on Hyperion of Tennessee's Petition for Preemption, have been served on the parties listed below, via first class mail, postage prepaid on the 27th day of July, 1998.

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